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No. 00-1245

In the Supreme Court of the United States

CATALINO ROSARIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court committed plain error by sentencing petitioner for conspiracy to distribute cocaine, and attempted possession of cocaine with the intent to distribute it, in accordance with 21 U.S.C. 841(b)(1)(A) (1994 & Supp. IV 1998), in the absence of a jury finding as to the quantity of drugs involved in petitioner's offense.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 234 F.3d 347.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 2000. The petition for a writ of certiorari was filed on January 31, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of conspiring to distribute cocaine, and attempting to possess cocaine with the intent to distribute it, both in violation of 21 U.S.C. 846.

Petitioner was sentenced to concurrent terms of 372 months' imprisonment, to be followed by ten years of supervised release, on each of the two counts of conviction. C.A. App. A79. The court of appeals affirmed. Pet. App. 1-9.

1. Petitioner managed an organization that distributed cocaine in the Chicago area, and he was responsible for the transportation of large quantities of cocaine from California to Illinois. He was arrested following the arrest and cooperation of one of his workers, who was in the process of bringing the cocaine into Illinois. Presentence Report (PSR) 2-3.

Petitioner was charged with conspiring to distribute kilogram quantities of cocaine and attempting to possess cocaine with the intent to distribute it. The conspiracy count of the indictment alleged, *inter alia*, that petitioner and a co-defendant "picked up a shipment of 100 kilograms of cocaine," Indictment para. 5, and that the two men arranged for a car to be loaded with 46 kilograms of cocaine, *id.* para. 7. With respect to the attempted possession count, the indictment alleged that petitioner and another co-defendant "attempted to possess with intent to distribute approximately 46 kilograms of a mixture containing cocaine." *Id.* at 4.

At trial, petitioner did not seek an instruction requiring the jury to determine the quantity of drugs involved in petitioner's offenses, and the district court gave no such instruction. The jury found petitioner guilty of the offenses alleged in the indictment. C.A. App. A1.

The PSR determined that petitioner's base offense level under Sentencing Guidelines (Guidelines) § 2D1.1(c)(1) was 38, and it recommended upward adjustments for petitioner's supervisory role in the

offense and his possession of a firearm. PSR 5-6. The district court adopted the PSR's finding as to the quantity of drugs involved, enhanced petitioner's sentence by three levels for his role in the offense, but rejected the firearm enhancement. 06/24/99 Sent. Tr. 8. Petitioner had previously been convicted of a federal narcotics felony. PSR 7. Petitioner's Guidelines sentencing range was 360 months' to life imprisonment, and the district court sentenced him to concurrent terms of 372 months' imprisonment on each of the two counts of conviction. Judgment 2, 6; C.A. App. A79; see 06/24/99 Sent. Tr. 8, 10.

2. Petitioner filed an appeal in which he challenged several aspects of the pretrial and trial proceedings in his case. Petitioner did not challenge any aspect of his sentence. The court of appeals affirmed the judgment of the district court. Pet. App. 1-9.

ARGUMENT

1. Petitioner argues (Pet. 4-7) that his 372-month sentence was imposed in violation of this Court's decision in *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000), because the district court rather than the jury determined the quantity of cocaine attributable to him. In *Apprendi*, the Court held, as a matter of constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 2362-2363.

Petitioner was convicted of one count each of conspiracy to distribute cocaine and attempted possession of cocaine with the intent to distribute it. He was subject to sentencing on those offenses in accordance with the graduated penalties set forth in 21 U.S.C. 841(b) (1994

& Supp. IV 1998), and the district court sentenced him to concurrent terms of 372 months' imprisonment on each count. A 372-month sentence is authorized by 21 U.S.C. 841(b)(1)(A) (1994 & Supp. IV 1998), which provides that a defendant with a prior felony drug conviction who has been found guilty of a drug offense involving five kilograms or more of cocaine "shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment." When a defendant with a prior felony drug conviction has been found guilty of a drug offense involving *any* quantity of cocaine, 21 U.S.C. 841(b)(1)(C) (1994 & Supp. IV 1998) authorizes "a term of imprisonment of not more than 30 years." Thus, petitioner's 372-month sentence on each of the two counts of conviction was above the statutory maximum authorized by Section 841(b)(1)(C), and it was premised on a fact (*i.e.*, that the offense involved five kilograms or more of cocaine) that the jury was not instructed to find beyond a reasonable doubt. Imposition of a sentence on each count of greater than 30 years' imprisonment, based on the district court's drug quantity determination, was error under this Court's decision in *Apprendi*.

2. Petitioner did not raise his claim in either court below.[1] The claim is therefore reviewable only for plain error. Fed. R. Crim. P. 52(b); see *Johnson* v. *United States*, 520 U.S. 461 (1997); *United States* v. *Meshack*, 225 F.3d 556, 575 (5th Cir. 2000), cert. denied, 121 S. Ct. 834 (2001); *United States* v. *Nordby*, 225 F.3d 1053, 1060

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[1] The court of appeals issued its decision more than three months after this Court's decision in *Apprendi*. Pet. App. 1. Petitioner does not contend that he brought the *Apprendi* decision to the attention of the court of appeals during that interval. See Fed. R. App. P. 28(j).

(9th Cir. 2000). The district court's error in imposing a 372-month sentence on each count based on drug quantity findings made by the court at sentencing was "plain," because the error was "clear" or "obvious" after the decision in *Apprendi*. See *Johnson*, 520 U.S. at 467-468 ("where the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration"); *Nordby*, 225 F.3d at 1060.

Petitioner is not entitled to relief, however, unless he can also demonstrate that the error both "affect[ed] substantial rights" and "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 467 (quoting *United States* v. *Olano*, 507 U.S. 725, 732 (1993)). Petitioner cannot satisfy those requirements. On the facts of this case, petitioner could have no realistic possibility of obtaining any reduction in his overall sentence if the case were remanded for further proceedings in the court of appeals.

Even if petitioner had initially been sentenced to Section 841(b)(1)(C)'s 30-year maximum term of imprisonment on the conspiracy conviction, the district court would have had the statutory authority to impose a consecutive rather than concurrent sentence on the attempted possession count, see 18 U.S.C. 3584, and under Guidelines § 5G1.2 the court would have been required to proceed in that manner. "Rather than running the sentences concurrently, the Sentencing Guidelines would require that the sentence imposed on * * * the substantive count[] run consecutive to the sentence on the conspiracy count, to the extent necessary to produce a combined sentence equal to the total [Guidelines] punishment." *United States* v. *Page*, 232 F.3d 536, 544 (6th Cir. 2000) (citing Guidelines

§ 5G1.2(d)), petition for cert. pending, No. 00-7751 (filed Jan. 3, 2001) and cert. denied, No. 00-8491 (Mar. 19, 2001). Because petitioner would have been subject to the same 372-month term of imprisonment through the imposition of consecutive sentences on the conspiracy and attempted possession counts, the *Apprendi* error in this case could neither affect substantial rights nor seriously affect the fairness, integrity, or public reputation of judicial proceedings.[2] Petitioner therefore cannot satisfy the requirements for obtaining relief under Rule 52(b). See *Page*, 232 F.3d at 544-545; accord *United States* v. *Sturgis*, 238 F.3d 956, 960-961 (8th Cir. 2001); *United States* v. *White*, 238 F.3d 537, 543 (4th Cir. 2001).

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[2] As we explain above (see p. 4, *supra*), Section 841(b)(1)(C) authorizes a term of imprisonment of up to 30 years for a defendant who is convicted of an offense involving *any* quantity of cocaine and who has previously been convicted of a felony drug offense. *Apprendi* did not overrule this Court's decision in *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), that Congress may constitutionally treat prior conviction of a crime—here a "felony drug offense"—as a sentencing factor to be found by the court. *Apprendi*, 120 S. Ct. at 2361-2363, 2366. In any event, even if petitioner's statutory maximum sentence on each of the two counts of conviction were 20 years' imprisonment—the maximum term authorized by Section 841(b)(1)(C) for defendants with no prior felony drug convictions—the district court would still have been authorized, consistent with all applicable statutory and Guidelines provisions, to sentence petitioner to 372 months' imprisonment by running the sentences on the two convictions consecutively in part.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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